Supreme Court, U. S.
FILED
FEB 8 1978
MICHAEL RODAK, JR., CLERK

Nos. 77-690, 77-724, and 77-5730

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN ELI STONE, RICHARD CARL BIGGS,
JOHN DAYTON RITTER and
JAMES WILLIAM WINNINGHAM, PETITIONERS

v.

UNITED STATES OF AMERICA

REUBEN GOLDSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY DAIDONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-14)[1] is reported at 558 F. 2d 775.

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[1]"Pet. App." refers to the appendix to the petition in No. 77-690.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1977. A petition for rehearing filed by all petitioners was denied on October 14, 1977. The petitions in No. 77-690 and No. 77-5730 were filed on Monday, November 14, 1977; the petition in No. 77-724 was filed on November 11, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an Acting Attorney General may designate an Assistant Attorney General to authorize applications for orders permitting electronic surveillance (Pet. No. 77-690 only).

2. Whether the application for the intercept order in this case sufficiently established that other investigative methods were inadequate.

3. Whether the evidence derived from the electronic interception must be suppressed because of the issuing judge's failure personally to date the intercept order at the time the order was issued.

4. Whether the interception was conducted in conformity with the order (Pets. No. 77-690 and 77-5730).

5. Whether the evidence derived from the interception must be suppressed because of a brief delay in sealing the tapes of the intercepted conversations (Pet. No. 77-690 only).

6. Whether the evidence against petitioner Goldstein derived from the interception must be suppressed because the court was not informed that his conversations had been intercepted (Pet. No. 77-724 only).

STATEMENT

Following a jury-waived trial in the United States District Court for the Northern District of Texas, petitioners Stone, Goldstein, Daidone, Ritter and Winningham were convicted of using interstate communication facilities for the transmission of bets, wagers, and information concerning sporting events, in violation of 18 U.S.C. 1084 (Count 5). Petitioners Stone and Biggs were convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955 (Count 1).[2] Petitioners were sentenced as follows. Stone: consecutive terms of three years' imprisonment for Count 1 and two years' imprisonment for Count 5, and a fine of $10,000. Goldstein: two years' imprisonment (to run consecutively to a sentence imposed in another case) and a $10,000 fine. Daidone: 13 months' imprisonment. Ritter: two years' imprisonment and a $5,000 fine. Winningham: a $10,000 fine. Biggs: a $10,000 fine.

The case was submitted on the basis of stipulated evidence, a large part of which consisted of telephone conversations intercepted pursuant to a court order. The sufficiency of the evidence is not in dispute, and petitioners' convictions stand or fall with the propriety of the district court's refusal to grant their motions to suppress the evidence derived from the interception.

On November 20, 1973, Judge Taylor of the United States District Court for the Northern District of Texas authorized the interception by the government of calls to and from petitioner Stone's private telephone and two public pay telephones located in Stone's restaurant (Pet.

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[2]The remaining counts were dismissed at the request of the prosecutor.

App. A-17 to A-21).[3] The order authorized interception for 15 days from its date (*id.* at A-21). Although Judge Taylor did not date the order, Assistant United States Attorney Harold Jacquet testified that immediately after the order was signed he took it to the clerk's office, where it was date-stamped and filed (C.A. App. 123-125).[4]

In order to protect the privacy of innocent persons who might use the two public telephones, the order provided that conversations on those telephones could be monitored only when it was determined by surveillance that Stone was in the restaurant, and that conversations could be intercepted only when Stone was identified as a party (Pet. App. A-20). Conversations were intercepted from November 20, 1973, through December 4, 1973 (Pet. No. 77-690, p. 5).

During the course of the interception, three five-day reports summarizing the results of the interception and describing unauthorized interceptions were submitted to Judge Taylor (Pet. App. A-52 to A-55). The original tape recordings of the intercepted conversations were presented to Judge Taylor for sealing on December 17, 1973 (Pet. No. 77-690, p. 6), thirteen days after the termination of the interceptions.

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[3]The United States Attorney was authorized to apply for the interception order by Henry E. Petersen, the Assistant Attorney General in charge of the Criminal Division of the Department of Justice (Pet. App. A-18 to A-19). Acting Attorney General Robert H. Bork had designated Mr. Petersen to authorize applications for the interception of wire communications (Pet. App. A-56).

[4]"C.A. App." refers to petitioners' consolidated appendix in the court of appeals.

ARGUMENT

1. Petitioners in No. 77-690 contend that the intercept order was invalid because the Assistant Attorney General who authorized the application was designated by Acting Attorney General Bork instead of the Attorney General, as provided in 18 U.S.C. 2516(1).[5] This claim is insubstantial.

The courts of appeals that have addressed this question have uniformly held that Acting Attorney General Bork had all the powers of the Attorney General, including the authority to designate an Assistant Attorney General to authorize applications for intercept orders. *United States* v. *McCoy*, 539 F. 2d 1050 (C.A. 5); *United States* v. *Guzek*, 527 F. 2d 552 (C.A. 8); *United States* v. *Pellicci*, 504 F. 2d 1106 (C.A. 1), certiorari denied, 419 U.S. 1122. These decisions recognize that the congressional requirement that the officer ultimately responsible for authorizing electronic surveillance be politically responsive (*United States* v. *Giordano*, 416 U.S. 505, 520 n. 9) is satisfied here because Acting Attorney General Bork, who was Solicitor General prior to becoming Acting Attorney General, was nominated by the President and confirmed by the Senate (28 U.S.C. 505).[6] 28 U.S.C. 508(b)

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[5]18 U.S.C. 2516(1) provides in pertinent part:

> The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications * * *.

[6]*United States* v. *Acon*, 513 F. 2d 513 (C.A. 3), on which petitioners rely, suggested that the Attorney General could not designate an Acting Assistant Attorney General to pass on applications for intercept authorizations because an Acting Assistant

authorized Solicitor General Bork to assume all of the duties of the Attorney General while that office was vacant, and there is no reason to conclude that he lacked the authority to designate an Assistant Attorney General to authorize intercept applications.

2. Petitioners contend that the application for the intercept order did not sufficiently explain why other investigative techniques were inadequate.[7]

18 U.S.C. 2518(1)(c) requires the application and accompanying affidavit to contain a "full and complete statement" why other investigative techniques are inadequate. The requirements of Section 2518 (1)(c) are satisfied when an affidavit, read in a practical and common sense fashion (see S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), shows a sufficient factual basis from which the issuing authority can reasonably conclude that electronic surveillance is necessary to obtain evidence for the successful prosecution of persons known to be involved in the activities under investigation, or is necessary to ascertain the full scope of their activities and identify the participants. See, *e.g.*, *United States* v. *Turner*, 528 F. 2d 143, 152 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996; *United States* v. *Steinberg*, 525 F. 2d 1126, 1129-1131 (C.A. 2), certiorari denied, 425

Attorney General, not having been nominated and confirmed, did not meet the test of political responsiveness (513 F. 2d at 516). In contrast, here both the Acting Attorney General and the Assistant Attorney General who approved the government's application had been nominated by the President and confirmed by the Senate (28 U.S.C. 506). Thus both officials met the "political responsiveness" test.

[7] 18 U.S.C. 2518(1)(c) provides that every application for an interception order shall include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

U.S. 971; *United States* v. *De La Fuente*, 548 F. 2d 528, 537-538 (C.A. 5); *United States* v. *Jackson*, 549 F. 2d 517, 536-537 (C.A. 8).

The court of appeals correctly concluded that the affidavit here (see Pet. App. A-29 to A-51) provided such a factual basis (*id.* at A-4 to A-6). The affidavit of Agent Bryant accompanying the application clearly indicates that the informants, who were familiar with the gambling operation and who had provided useful information, were afraid to testify. This factor strongly indicates the propriety of interceptions (see *United States* v. *Alfonso*, 552 F. 2d 605 (C.A. 5); *United States* v. *Feldman*, 535 F. 2d 1175 (C.A. 9)).

The affidavit also detailed the results of several months of physical surveillance, which disclosed that petitioner Stone, the experienced gambler who was in charge of the operation (Pet. App. A-47, A-48), was careful to conceal his operations, evidently using various public telephones in the Dallas area to conduct his gambling business (*id.* at A-33, A-35). One of the public telephones at the restaurant was in the kitchen, making physical surveillance impractical (*id.* at A-31). Moreover, physical surveillance at the restaurant during the time it was open had been tried and found ineffective (*id.* at A-45). Although a search of telephone company toll records confirmed that many calls from the target phones had been placed to petitioner Daidone's number in Las Vegas (*id.* at A-46), this was insufficient to establish violations of Sections 1084 and 1955.

In addition to the facts outlined above, the affidavit detailed the conclusions of Agent Bryant that, based on his familiarity with how gambling operations are conducted, further use of conventional investigative techniques would prove unavailing (Pet. App. A-48 to A-51). As he pointed out, a physical search of the premises,

although possibly yielding some of the records of the organization, would not produce sufficient evidence to convict, because gambling records are often cryptic and incomplete. Physical surveillance is generally unproductive where, as here, most of the gambling business is conducted over the telephone. Moreover, because of the location of the telephones, the agents at the restaurant could not overhear significant conversations without disclosing their interest.

The affidavit in this case thus contained more than the conclusory allegations found insufficient in *United States* v. *Kalustian*, 529 F. 2d 585 (C.A. 9), relied on by petitioners.[8] The mere fact that an affidavit contains conclusions by the affiant based on his experience with the type of criminal activity under investigation is not fatal, so long as the conclusions are supplemented with facts sufficient to indicate that electronic surveillance is not being used as the first step in the investigation. *United States* v. *Landmesser*, 553 F. 2d 17 (C.A. 6); *United States* v. *Alfonso*, 552 F. 2d 605 (C.A. 5). Agent Bryant's lengthy affidavit meticulously described the efforts to establish petitioners' criminal activity without the use of electronic surveillance, and, accordingly, the affidavit was sufficient to establish the need for the interception.

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[8]As we have noted in our brief in opposition to certiorari in *Berlin* v. *United States*, No. 77-548, certiorari denied, January 9, 1978, the *Kalustian* panel appears to have required greater specificity in supporting affidavits than has been required by other courts, even in the Ninth Circuit. See *United States* v. *Spagnuolo*, 549 F. 2d 705 (C.A. 9). For the reasons stated in our brief in *Berlin*, we have not suggested that this inconsistency merits review by this Court, and nothing has happened recently to justify any change in this Court's refusal to review decisions alleged to be inconsistent with *Kalustian*. We are sending petitioners copies of our brief in *Berlin*.

3. Petitioners contend that the issuing judge's failure personally to date the order rendered it invalid, because, they argue, the absence of a date made the order unlimited in duration, in violation of 18 U.S.C. 2518(4)(e) and (5).[9] The facts belie this contention.

The order specified that the surveillance "must terminate" not later than "fifteen (15) days from the date of this Order" (Pet. App. A-21), and it is undisputed that the electronic surveillance of Stone's telephones lasted just 15 days—from November 20, 1973, until December 4, 1973 (Pet. 77-690, p. 5). The testimony of Harold Jacquet, the Assistant United States Attorney who applied for the order, and Agent Bryant, the agent in charge of the investigation who was present in Judge Taylor's chambers when the order was signed, established that the order was signed and issued on November 20, 1973 (C.A. App. 51, 79-80). It is uncontested that, after the order was signed, it was taken to the court clerk's office for filing, where it was date-stamped "November 20, 1973" (C.A. App. 123-125). On application of the government, Judge Taylor amended the order *nunc pro tunc* to include the date of issuance (C.A. App. 194-196).

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[9]18 U.S.C. 2518(4)(e) provides that:

> Each order authorizing or approving the interception of any wire or oral communication shall specify—
>
> (e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

18 U.S.C. 2518(5) provides in pertinent part:

> No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days.

Relying on *United States* v. *Lamonge*, 458 F. 2d 197 (C.A. 6), certiorari denied, 409 U.S. 863, petitioners argue that the order was invalid simply because Judge Taylor did not date it in his chambers when he signed it. Although the court in *Lamonge* suggested that an undated order would be invalid because it would be impossible to tell from its face when the authorized period of interception began,[10] there was no such difficulty here. This order was date-stamped by the clerk on the same day it was signed; Agent Bryant, who was in charge of the FBI interception operation, had personal knowledge of when the order was issued. Under these circumstances the agents conducting the interception were fully informed of the permissible duration of the surveillance and, in fact, the interception was conducted in strict conformity with the limitations of the order. There was no error and, if there were, it would be well within the scope of correction permissible under Fed. R. Crim. P. 36.[11]

4. The intercept order provided that the public telephones could be monitored only when it was determined by physical surveillance that Stone was on the premises and could be intercepted only when Stone was identified as a party to the conversation (Pet. App. A-20). Petitioners in Nos. 77-690 and 77-5730 argue that all the

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[10]The conviction in *Lamonge* was affirmed because the court concluded that the evidence derived from the interception was irrelevant in light of the defendant's reliance on an entrapment defense. The court's discussion of the sufficiency of the order therefore was *dictum*.

[11]Rule 36 provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

intercepted conversations should have been suppressed because the agents occasionally failed to comply with these terms.[12]

A copy of the order was given to Agent Bryant to post in the Federal Bureau of Investigation's "wire room" (C.A. App. 125). Assistant United States Attorney Jacquet gave the agents conducting the interception instructions regarding the restrictive requirements in the order (C.A. App. 130-131, 139-140). The testimony of Jacquet, taken together with the reports submitted to Judge Taylor (Pet. App. A-52 to A-55), shows that a good faith effort was made to conform to these requirements and to avoid the unauthorized interception of calls between third parties. This investigation was not conducted in disregard of the court-ordered restrictions, as was the interception in *United States* v. *George*, 465 F. 2d 772 (C.A. 6), on which petitioner Daidone relies (Pet. No. 77-5730, p. 6). On the contrary, as the court below held, the agents did all that was reasonably possible to comply with the court's order, although they were sometimes unable to determine when

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[12]Petitioners in No. 77-690 also argue (Pet. 11-13) that this failure affected one of the "statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures" (*United States* v. *Giordano*, 416 U.S. 505, 527), and thus warranted suppression regardless of any good faith efforts to minimize unnecessary interceptions. But no statutory requirement dictated the limitations on the interception of conversations on the restaurant telephones; these limitations were contained only in the order, and thus reflect no "congressional intention" at all. Moreover, petitioners' interpretation of the order as absolutely precluding even inadvertent interceptions not within the terms of the order is contrary to that of the author of the order; when Judge Taylor was informed of the inadvertent interceptions, he agreed with Jacquet's suggestion that serving inventories on all identifiable people whose conversations had been overheard would cure any error (C.A. App. 144-145).

Stone left the restaurant and occasionally intercepted calls to which he was not a party because of difficulties in voice identification (Pet. App. A-7 to A-8).[13]

In a related argument, petitioners contend that suppression is required because the five-day reports submitted to Judge Taylor (Pet. App. A-52 to A-55) did not detail the agent's difficulties in identifying Stone's voice. In fact, the five-day reports did inform the judge of the difficulty in identifying Stone's voice (Pet. App. A-52), and, as Jacquet testified, most of the misidentifications were discovered after the conclusion of the interception (C.A. App. 146-147). What is more, even this was unnecessary, because the order required only that the reports include a statement of the progress being made and the need for continued interception (Pet. App. A-21). Under these circumstances the government adequately complied with the reporting requirement outlined in the order.[14]

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[13]This Court need not hold this petition pending a decision in *Scott* v. *United States*, No. 76-6767, certiorari granted, October 11, 1977. The issue in *Scott* is whether the alleged subjective intent of the monitoring agents to intercept every call constituted a violation of the statutory minimization requirement, although the interception of every call was objectively reasonable. Here there is no claim that the monitoring agents had any improper subjective intent; there was, in fact, very substantial minimization of the calls overheard, and the particular minimization rule in the intercept order exceeded the statutory minimization requirement.

[14]Of course, if the supervising judge should believe that the progress reports are insufficient he could require further information; no such request was made here, and there is no indication that any information was intentionally concealed from the judge. Because progress reports are not required by statute, the determination of their adequacy is peculiarly a matter for the supervising judge. *United States* v. *Iannelli*, 477 F. 2d 999 (C.A. 3), affirmed on other grounds, 420 U.S. 770.

5. The interception was concluded on December 4 and the tapes were sealed on December 17 (Pet. No. 77-690, p. 19). Petitioners in No. 77-690 argue that the interception evidence should have been suppressed because the tapes of intercepted conversations were not immediately sealed, as 18 U.S.C. 2518(8)(a) requires.[15]

The purpose of the sealing requirement is to preserve the integrity of the tapes by assuring that tampering or editing will not take place and, in the absence of a showing that a brief delay in sealing was prejudicial, suppression is not required. *United States* v. *Angelini*, 565 F. 2d 469 (C.A. 7) (38 day delay adequately justified);[16] *United States* v. *Lawson*, 545 F. 2d 557 (C.A. 7); *United States* v. *Sklaroff*, 506 F. 2d 837, 840-841 (C.A. 5), certiorari denied, 423 U.S. 874 (14 day delay constitutes "substantial compliance" with Section 2518(8)(a)); *United States* v. *Falcone*, 505 F. 2d 478 (C.A. 3), certiorari denied, 420 U.S. 955.[17] Accordingly, the court of appeals properly concluded that "[t]he defendants have not shown that they were prejudiced by the delay or that the integrity

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[15]18 U.S.C. 2518(8)(a) provides in pertinent part:

> Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. * * *

[16]*Angelini* cites the court of appeals' opinion in the present case as persuasive authority.

[17]The rule may be different where substantial delays are involved. Compare *United States* v. *Gigante*, 538 F. 2d 502 (C.A. 2) (delays of from 8 months 12 days to 12 months 25 days), with *United States* v. *Caruso*, 415 F. Supp. 847, 850-851 (S.D. N.Y.), affirmed, 553 F. 2d 94 (C.A. 2) (24 and 42 day delays).

of the interceptions was in any way disturbed. There was no error in refusing to suppress the evidence on this basis" (Pet. App. A-9).[18]

6. Petitioner Goldstein argues (Pet. No. 77-724, pp. 11-12) that the evidence concerning his recorded conversations must be suppressed because the government failed to notify Judge Taylor that these conversations had been intercepted, so that the judge could determine whether to require the service of an inventory notice on Goldstein.

The statute requires that the supervising judge shall, within 90 days of the termination of the interception, require the service of inventories "on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice" (18 U.S.C. 2518(8)(d)). Goldstein was not identified in the application or order, and he does not contend that he should have been. Indeed, his voice was not identified until well after the period for service of inventories had passed. His attorney was notified in August 1974 that Goldstein had been overheard, and the hearing on defendants' motion to suppress was held in June 1975. In these circumstances, the failure to inform Judge Taylor that Goldstein had been overheard was inadvertent and caused petitioner no prejudice. The court of appeals correctly concluded that suppression was not required (Pet. App. A-9 to A-10). See *United States* v. *Donovan*, 429 U.S. 413, 439 n. 26.

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[18]The interception here terminated more than a year before the institution of the particularized procedures to remind officials of the various steps necessary upon discontinuation of an interception, which we described to this Court in our brief in opposition in *Falcone* v. *United States*, Nos. 74-5500 and 74-5619.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1978.

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